

Julia Jackson SBN 255506
JACKSON & TUERCK
429 Main Street, Suite C
P.O. Box 148
Quincy, CA 95971
Tel. (530) 283-0406
Fax (530) 283-0416
julia.r.jackson@gmail.com

Attorney for California Water Impact Network (C-WIN)

STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

In the matter of:

Proposed Modification of WR 2006-0006

)
)
)
)
)
)
)

**CLOSING BRIEF OF THE CALIFORNIA
WATER IMPACT NETWORK**

INTRODUCTION

The California Water Impact Network (C-WIN) files this Closing Brief in opposition of the State Water Resources Control Board (SWRCB or Board) proposed modification of Board Order WR 2006-0006. CWIN maintains that it is not in the public interest to modify WR 2006-0006.

On June 25, 2009, the Board conducted a hearing on the proposed modification of SWRCB Order WR 2006-0006. The primary issues for the Board's consideration, as identified in the June 5, 2009 notice for the hearing, were:

1. What modification, if any, should the State Water Board make to the compliance schedule set forth in Part A of Order WR 2006-0006, and how should any modifications be structured to take into account any potential changes to the southern Delta salinity objectives or the program of implementation that may

occur as a result of the State Water Board's current review of the Bay-Delta Plan?
and;

2. If the compliance schedule contained in Part A of Order WR 2006-0006 is modified, what interim protective measures, if any, should be imposed?

The California Water Impact Network (C-WIN) presented evidence at the hearing on June 25th and 30th. Evidence presented in the hearing established that the Bureau of Reclamation (hereinafter "USBR") and the Department of Water Resources (hereinafter "DWR") had ample time to comply with Order 2006-0006 and have failed to do so. Evidence further showed that there is no cause to modify the deadline imposed by WR 2006-0006, and that enforcement of the interior Delta salinity standards is warranted.

BACKGROUND

In 1978, the SWRCB adopted the 1978 Water Plan, which established the 0.7 millimhos per centimeter (mmhos/cm) electrical conductivity (EC) objective for southern Delta agriculture at specified southern Delta compliance locations between April 1 and August 31 of each year. DWR's permits and USBR's license and permits¹ require DWR and USBR to meet the 0.7 EC standard, with the SWRCB finding that USBR and DWR are "*each fully responsible* for meeting...the interior southern Delta salinity objectives" as laid out in Water Right Decision 1641 (revised March 15, 2000), in accordance with Order WR 2002-02.² In the hearing leading to D-1641 (beginning July 1, 1998) "DWR representatives advised the Board that the barriers described in D-1641...would be completed by 2005."³ In February of 2005, USBR and DWR filed a joint petition for temporary urgency change with the SWRCB, requesting relief from the 0.7 EC objective in the interior southern Delta at stations C-6, C-8, and P-12, from April through August of 2005. USBR and DWR further petitioned the SWRCB to change the effective date of their compliance with the 0.7 EC objective in the southern Delta until December 31, 2008 "to coincide with the then anticipated date for completion of the southern Delta barriers

¹ Permits cited by WR 2006-0006 as follows: 16478, 16479, 16481, 16482, and 16483 of the Department of Water Resources and License 1986 and Permits 11315, 11316, 11886, 11887, 11967, 11968, 11969, 11970, 11971, 11972, 11973, 12364, 12721, 12722, 12723, 12725, 12726, 12727, 12860, 15735, 16597, 16600, and 20245.

² Order WR 2006-0006, section 2.3 (emphasis added)

³ Order WR 2006-0006, section 2.3.1

project.”⁴ On February 15, 2006 the SWRCB issued an order imposing a new time schedule for DWR and USBR to meet the 0.7 EC objective by July 1, 2009. In the Order, the Board expressly stated that “the State Water Board *will not extend the date* for removing the threat of non-compliance *beyond July 1, 2009.*”⁵

On June 5, 2009, the Board noticed a public hearing regarding whether the July 1, 2009 date for enforcement of the 0.7 EC standard should be modified. As this hearing was not noticed to include any argument regarding whether DWR and USBR *should* be responsible for meeting these objectives, no such argument is here presented, nor should any evidence on such an argument be considered by the Board.

ARGUMENT

C-WIN’s position is that the Board should not modify WR 2006-0006. The argument presented by the Bureau of Reclamation and the Department of Water Resources that they cannot meet the summer 0.7 EC standard in the Delta without permanent operable barriers is inaccurate, and contrary to evidence presented in the hearing. Further, when the Board required that the compliance date of July 1, 2009 be set in Order WR 2006-0006, they did *not* condition compliance on the building of permanent operable barriers. Therefore, the Board should not modify Order WR 2006-0006 and should seek to enforce against USBR and DWR for their violation of the 0.7 EC standard in the Delta.

A. Modification Is Not In The Public Interest

In WR Order 2006-0006, adopted February 15, 2006, the State Water Board ordered DWR and USBR to take corrective actions under a time schedule to end the threat of noncompliance with their permit and license Delta salinity conditions by July 1, 2009. Condition A.2 of the CDO requires DWR and USBR to develop and implement a plan to obviate the threat of noncompliance with the interior southern Delta salinity objectives. Condition A.2 specifies that the compliance plan may provide for implementation of permanent barriers in the Delta or other measures if those measures would provide the same degree of salinity control as the barriers. Condition A.6 of Order WR 2006-0006 requires DWR and USBR to submit quarterly reports on progress towards compliance

⁴ Id.

⁵ Order WR 2006-0006, section 6.0, paragraph 4-5 (emphasis added)

and an updated projection of the final compliance date. As early as 2007, DWR and USBR's reports acknowledge that they would not be able to complete the permanent barriers by the July 1, 2009 deadline.⁶ Nevertheless, DWR and USBR failed to consider, much less implement, any alternative measures for meeting the salinity objectives.

DWR and USBR's failure to comply with the July 1, 2009 deadline and the salinity standards is a direct harm to the public's interest. Interior Delta salinity standards were imposed as a condition of DWR's and USBR's license/permits to protect Delta agriculture. Protection of Delta agriculture has been seen as in the public interest for years, and was expressly held as such by the Board in D-1641: "[n]otwithstanding the unavailability of water to satisfy existing water rights in the southern Delta during certain periods, the SWRCB has determined that protection of agriculture in the southern Delta is in the public interest."⁷ This public interest has not changed. C. Mel Lytle presented testimony to the board regarding the value of south Delta agriculture. He testified that "according to the San Joaquin Agricultural Commissioner's Office 2007 Annual Crop Report found that the gross value of agricultural production for 2007 in the County is estimated to be \$2,005,793,000" but that the [f]uture success of agriculture and the County economy as a whole depends upon reliable water supplies of *adequate quality*."⁸ The Board held that salinity standards in the Southern Delta exist "to protect agricultural beneficial uses of water."⁹ D-1641 made specific findings about responsibility for the water quality problems in the Delta, and the Board must recognize that responsibility and enforce the standards against USBR and DWR.

Proper enforcement would not only protect Delta agriculture, it would also protect the public interest in preserving California's fisheries and wildlife. It is widely acknowledged that drainage problems in the San Joaquin Valley threaten water quality, agriculture, fish and wildlife, and public health.¹⁰ DWR and USBR are charged with meeting the salinity standards designed to lessen those threats, yet they are once again seeking leave to postpone their obligations. Allowing additional delays in the enforcement of the interior southern Delta salinity objectives will work irreparable harm on the public's interest in

⁶ Staff Exhibit 4, May, 2009 DWR Quarterly Status Report, p. 1

⁷ Staff Exhibit 2, D-1641 at 35

⁸ Written Testimony of C. Mel Lytle, p. 6

⁹ Staff Exhibit 2, D-1641 at p. 79

¹⁰ Staff Exhibit 2, D-1641 p. 85

protecting Delta agriculture and fish and wildlife. As Tim Stroshane (C-WIN) stated in his testimony before the Board on June 30, 2009:

There is also a public interest that deserves declaration by the State Water Board that it is congressional intent that the anadromous fisheries of California's Central Valley be restored to population levels twice what they were in the average of the period 1967 to 1991, and that to honor this congressional intent—reflecting the will of the American people, not just the citizens of California—the State Water Board should declare as part of this CDO that there is a public interest served in the protection of anadromous fisheries for their intrinsic ecological worth as fish species as well as the economic and ecological livelihood they provide to numerous human communities.

If the Board chooses to amend Condition A-2, C-WIN believes it would be proper for the Board to make the condition stricter, requiring DWR and USBR to establish a plan that will comply with both the southern Delta salinity standards to protect Delta agriculture, and comply with the narrative fish doubling standard required by D-1641 to protect the public's interest in fish and wildlife beneficial uses.

B. DWR And USBR Had Ample Time And Various Methods To Comply With The Southern Delta Salinity Standards Achieve Salinity Standards And Have Repeatedly Failed To Do So

SWRCB Order 2006-0006 required USBR and DWR to meet the interior Delta summer salinity standards (0.7 EC) by July 1, 2009. USBR and DWR have repeatedly failed to meet these deadlines. DWR's Katherine Kelly stated in her June 1, 2009 letter to the Board that DWR knew as early as May, 2007¹¹ that the permanent operable barriers could not be completed by July 1, 2009, and yet subsequently failed to implement any new strategy to meet the salinity objective due date. Although numerous methods have been identified to meet the 0.7 EC standards, the permanent operable barriers have been the only option to receive significant consideration.

Many other options have been and still are available to meet the salinity objectives in the southern Delta, including increased fresh water dilution and regional management of drainage water.¹² For example, one of the tools that the Board recommended to meet the salinity objectives – increased dilution – has not been investigated. Given the currently

¹¹ Staff Exhibit 4, May, 2009 DWR Quarterly Status Report, p. 1

¹² Staff Exhibit 2, D-1641 p. 83-84

woeful state of California fisheries, it seems inconceivable that the Board would allow salinity objectives that positively impact agricultural, economic, and environmental interests to go un-enforced, particularly when the means of achieving those objectives are presently available.

In his written and oral testimony, Alex Hildebrand presented several *currently feasible* options to meet the salinity objectives, none of which studied or implemented by DWR. Mr. Hildebrand testified that: “during 2008 there were a series of meetings among SDWA (South Delta Water Agency), DWR, and USBR engineers to reach engineering consensus on measures, most of which could be implemented in 2009 and all of which could be implemented by 2010, with no significant water cost.”¹³ But rather than evaluating and implementing these measures well before the July 1, 2009 deadline mandated by WR Order 2006-0006, DWR and USBR have instead asserted that the compliance deadline should be stayed until a date uncertain so they can have time to try, yet again, to get the permanent barriers constructed.

In Board decision 1641, the Board admonished DWR and USBR to look into various actions that would meet the salinity standards, including additional flows, potential changes in export operations, and recirculation of water. And yet neither DWR nor USBR have evaluated or implemented these options as a means of complying with the southern Delta salinity objectives. Instead they insist on pursuing a course of action defying the Board’s timelines in order to someday create barriers that will not even result in achieving the standards mandated by the Board.

To modify DWR and USBR’s compliance deadline when an existing order expressly states that there shall be no extension of time would gravely undermine the legitimacy of the SWRCB. While DWR claims that delays in building the permanent barriers were out of their control,¹⁴ their choice to favor the barriers over every other method of compliance was *entirely* in their control. If the Board does not enforce the July 1, 2009 compliance deadline, it will send a clear signal to DWR, the Bureau, and people of California, that compliance with State Water Board orders is simply not required. In WR 2006-0006 the Board ardently declared, “[c]onsidering that the objectives were first

¹³ Written Testimony, Alex Hildebrand, p. 1

¹⁴ Oral Testimony of Katherine Kelly (DWR), June 25, 2009, *passim*

adopted in the water quality control plan in 1978, and there is evidence that salinity is a factor in limiting crop yields for southern Delta agriculture, the State Water Board will not extend the date for removing the threat of non-compliance beyond July 1, 2009.”¹⁵ Granting another extension now, after such a definite declaration, would be tantamount to admitting that the Board’s Orders are mere empty words which are not to be taken seriously.

C. Permanent Operable Barriers Were Never Mandated By The Board

As an apparent explanation for their dogged determination to build the permanent operable barriers in the face of continual delays, it was suggested by Paul Fujitani (USBR) that “the principal corrective measure sought by the Board has been the construction of permanent operable barriers at the head of Old and Middle Rivers.”¹⁶ Their argument appears to be that DWR and the Bureau are attempting to implement a salinity control mechanism that the Board itself specified should be constructed. This idea could not be further from the truth, as California Water Code Section 13360 expressly prohibits the Board from specifying a particular manner of compliance, stating that:

No... order of a regional board or the state board or decree of a court issued under this division shall specify the design, location, type of construction, or particular manner in which compliance may be had with that requirement, order, or decree, and the person so ordered shall be permitted to comply with the order in any lawful manner.

Indeed, in WR Order 2006-0006, the Board never required or suggested that it favored the building of permanent operable barriers; it only required that the salinity standards set out in D-1641 be met:

It should be emphasized that DWR’s and USBR’s permit license conditions *do not* require construction of permanent barriers as the exclusive method of compliance. Accordingly, this order requires DWR and USBR to develop a plan and a time schedule to comply with their water right permit/license conditions requiring them to meet the 0.7 interior southern Delta EC objective. *They should consider all potential means of compliance.*¹⁷

¹⁵ State Water Resources Control Board, Order WR 2006-0006, p. 27

¹⁶ Written Testimony of Paul Fujitani (USBR), p. 1

¹⁷ SWRCB Order WR 2006-0006, section 4.2 (emphasis added)

More importantly, DWR and USBR are well aware that permanent tidal barriers operating alone would not even be sufficient to meet the interior Delta salinity standards. In D-1641, the Board expressly held that “[t]he construction of permanent barriers alone *is not expected to result in attainment of the water quality objectives*” and yet DWR and USBR continue to cling to the permanent barriers as *the* answer to salinity compliance in the south Delta.¹⁸ If the Board extends the July 1, 2009 compliance deadline to allow installation of permanent barriers would not only undermine the Board’s authority, it would also *fail* to implement compliance with the salinity objectives mandated by D-1641. Granting this modification would both contradict the public interest in protecting Delta agriculture and other beneficial water uses, and would make a mockery of the Board’s orders.

D. Other Options Not Pursued By DWR and USBR to Meet the Salinity Objectives Exist and Could Be Implemented Now

Many other options have been and are now available to meet the salinity objectives in the southern Delta, including increased fresh water dilution and regional management of drainage water.¹⁹ One of the tools that the Board recommended to meet the salinity objectives – increased river flows – has not been investigated. Bill Jennings of the California Sportfishing Protection Alliance (CSPA) testified in the June 30th hearing that DWR and USBR had been admonished in WR Order 2006-0006 and D-1641 that they were to look into various actions that would meet the salinity standards, including “additional flows,” potential “changes in export operations,” and “recirculation” of water.²⁰ And yet neither DWR nor USBR have fully investigated or implemented these options. Instead they insist on pursuing a course of action defying the Board’s timelines in order to someday create barriers that will not even result in achieving the standards mandated by the Board.

CONCLUSION

The Board must decide that protecting beneficial uses of water trumps administrative delays – that protecting the waterways that serve agricultural and environmental uses trumps the benefit of delays. Compliance cannot be pushed further

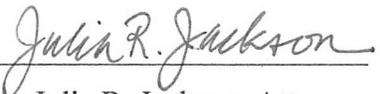
¹⁸ Staff Exhibit 2, D-1641 p. 88 (emphasis added)

¹⁹ Staff Exhibit 2, D-1641 p. 83-84

²⁰ Written Transcript, Testimony of Bill Jennings, June 30th, p. 45, line 24 - pg. 46 line 8

and further into the future without rendering all Board orders arbitrary and meaningless. Protecting the beneficial water uses of California citizens is far more important than accommodating the delays and inaction of government. Based on the evidence presented in this hearing, C-Win respectfully requests that the Board not modify the compliance date of July 1, 2009 as set out in WR 2006-0006 to ensure compliance with the agricultural water quality standards in D-1641. Significant harm will come to Delta agriculture and to other Delta water users if the agricultural standards are not enforced by the Board. The USBR and DWR should, *at long last*, be required to meet the salinity standards set out in D-1641.

Respectfully submitted this August 10, 2009



Julia R. Jackson, Attorney
California Water Impact Network